

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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THE ANDY WARHOL FOUNDATION FOR THE :  
VISUAL ARTS, INC., :

Plaintiff, :

vs. :

LYNN GOLDSMITH AND LYNN GOLDSMITH, :  
LTD. :

Defendants. :  
-----X

LYNN GOLDSMITH, :

Counterclaim Plaintiff, :

vs. :

THE ANDY WARHOL FOUNDATION FOR THE :  
VISUAL ARTS, INC., :

Counterclaim Defendant. :  
-----X

Case No. 17-cv-02532-JGK

ECF Case

**DEFENDANTS' AND  
COUNTERCLAIM PLAINTIFF'S  
STATEMENT PURSUANT TO  
LOCAL RULE 56.1**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, Defendants and Counterclaim Plaintiff Lynn Goldsmith (“Goldsmith”) and Lynn Goldsmith Ltd. (“LGL”) (collectively, the “Goldsmith Parties”), respectfully submit this Statement of Material Facts, as to which there are no genuine issues to be tried, in support of their accompanying Motion for Summary Judgment.

**Background and Parties**

1. The Andy Warhol Foundation For The Visual Arts, Inc. (“AWF”) filed a Complaint for Declaratory Relief on April 7, 2017 (Docket No. #6) (the “Complaint”). Exhibit (“Exh.”) “A” to Declaration of Barry Werbin, Esq, dated September 28, 2018 (“Werbin Exh.

—”).

2. The Goldsmith Parties filed an Amended Answer and Counterclaim on July 10, 2017 (Docket No. #20) (the “Goldsmith Answer” and “Counterclaim”). Werbin Exh. B.

3. AWF filed an Answer to Amended Counterclaim on July 24, 2017 (Docket No. #22) (“Answer to Counterclaim”). Werbin Exh. C.

4. AWF is a New York not-for-profit corporation that was formed in 1987 after Andy Warhol (“Warhol”) died. Werbin Exh. A [Complaint ¶¶ 8, 48].

5. AWF licenses Warhol images it controls to fund its programs.  
<https://warholfoundation.org/licensing/index.html>.

6. Goldsmith is an acclaimed professional celebrity portrait, documentary and fine art photographer. Werbin Exh. B [Counterclaim ¶ 9].

7. Goldsmith’s photographic works are in the collections of The Smithsonian National Portrait Gallery, The Museum of Modern Art, The Chicago Museum of Contemporary Photography, The Rock and Roll Hall of Fame, Museum Folkwang, The Polaroid Collection, The Kodak Collection, and other institutions. Werbin Exh. B [Counterclaim ¶ 9];  
<https://lynngoldsmith.com/wordpress/bio-cv/>.

8. A 1993 photographic portrait by Goldsmith of the rock star Prince is in the collection of the Smithsonian Institution National Portrait Gallery. Werbin Exh. S [Paulson 7]; Werbin Exh. J [Transcript of Lynn Goldsmith deposition dated January 18, 2018 (“Goldsmith Tr.”) at page 127, lines 14 – 18] (Deposition transcript pages/line numbers are hereafter referred to as “[page number] : [line number(s)]”).).

9. Over the past 50 years, Goldsmith’s editorial photography has appeared on and between the covers of *Life*, *Newsweek*, *Time*, *Vanity Fair*, *Rolling Stone*, *National Geographic*

*Traveler, Sports Illustrated, People, Elle, Interview, The New Yorker* and many other esteemed publications. *Id.*

10. Goldsmith has published 13 books of photography, including *New Kids*, which was on The New York Times Best Seller list. *Id.*; <https://lynngoldsmith.com/wordpress/books-2/>.

11. Since the 1960s, Goldsmith has photographed numerous celebrity musicians, singers and bands, including Prince, Michael Jackson, Bob Dylan, the Beatles, Mick Jagger and the Rolling Stones, Eric Clapton, James Taylor, Carly Simon, Bruce Springsteen, Bob Marley, Bonnie Raitt, Iggy Pop, Led Zeppelin, James Brown, Talking Heads, Van Halen, Gene Simmons (KISS), Sting, Miles Davis, Tony Bennett and many others. <https://lynngoldsmith.com/wordpress/galleries/musicians/>; <https://www.nytimes.com/2007/12/02/books/review/Michel-t.html>.

12. Goldsmith's photographic works have been exhibited in solo and group shows for over 30 years, including at The International Center of Photography (NY), Morrison Hotel Gallery (NY), Rock And Roll Hall Of Fame, Hallmark Museum of Contemporary Photography, Singleton-Bliss Museum of Fine Art (Santa Fe, NM), Museum of the Moving Image (NY), People Magazine – US Tour, The Polaroid Collection, Newark Museum of Art – Springsteen Exhibition, Kodak Rock Photography Collection, Portland Museum of Art, Brooklyn Museum of Art, George Eastman House, Royal Ontario Museum (Toronto) and The National Museum of Women in the Arts (Wash. D.C.). <https://lynngoldsmith.com/wordpress/bio-cv/>.

13. Goldsmith's celebrity photography has extended to non-music documentary works, including as examples the cast of Saturday Night Live and Mohammed Ali's "Rumble in the Jungle" bout (<https://lynngoldsmith.com/wordpress/documentary-galleries/>), and non-music

celebrity and statesperson portraiture, including as examples Warhol, Hunter S. Thompson, John Belushi, Dan Aykroyd, Eddie Murphy, Sarah Jessica Parker, Keith Haring, Martin Scorsese, William Shatner, Glenn Close, Richard Branson, Goldie Hawn, Mia Farrow, Kevin Costner, Hon. Madeleine Albright, Hon. Justice Stephen Breyer, and many others.

(<https://lynngoldsmith.com/wordpress/galleries/famous/> and <https://lynngoldsmith.com/wordpress/galleries/environmental/>).

14. Goldsmith's photographs of musicians and bands have appeared on over 100 album covers. <http://lynngoldsmith.com/recordcovers.htm>; Werbin Exh. S [Paulson 12].

15. Goldsmith received a 1985 World Press Photo "People in the News" award for a portrait of Michael Jackson. Werbin Exh. B [Counterclaim ¶ 9]; <https://www.worldpressphoto.org/people/lynn-goldsmith>.

16. Goldsmith uses the camera as an instrument in her path as an artist. Werbin Exh. J [Goldsmith Tr. at 18:22 - 19:12].

17. Goldsmith was the founder of Lynn Goldsmith Inc. ("LGI"), the first photo agency that focused on celebrity portraiture, representing the work of over two hundred worldwide photographers, including Goldsmith herself. Werbin Exh. C [Counterclaim ¶ 9]; Werbin Exh. J [Goldsmith Tr. at 114:8 -18].

18. Subsequent to 1984, LGI changed its name to Lynn Goldsmith, Ltd. Werbin Exh. J [Goldsmith Tr. at 115:3 - 6]; Werbin Exh. B [Goldsmith Answer ¶ 39].

**Goldsmith Photographs Prince in 1981 on Assignment for Newsweek**

19. As of 1981, Goldsmith had worked with Michael Jackson, who was a very shy person. Goldsmith knew his co-manager, Ron Weisner. Weisner called Goldsmith in 1981 and advised her that he was managing the musician Prince Rogers Nelson, commonly known as

“Prince,” and he would like her to work with Prince. Werbin Exh. J [Goldsmith Tr. at 78:20 - 80:3].

20. Following her call with Ron Weisner, Goldsmith spoke with Myra Kreiman, an art photo editor at Newsweek, about photographing Prince. Through her relationship with Weisner, Goldsmith knew that Prince was an up and coming artist and Kreiman trusted her knowledge. Werbin Exh. J [Goldsmith Tr. at 77:17 - 78:19; 80:4 - 15]; Werbin Exh. K [Transcript of Deposition of Myra Kreiman dated February 23, 2018 (“Kreiman Tr.”) at 8:9 -10]; Werbin Exh. A [Complaint ¶ 21].

21. Kreiman knew that Prince was a hot young musician and was appearing at the Palladium theater in New York. Newsweek would have wanted both live performance shots and good studio shots of Prince. Werbin Exh. K [Kreiman Tr. at 12:3 -13:15].

22. Kreiman and Jim Kenney, the head of Newsweek’s photo department in 1981, had a relationship with Goldsmith, loved Goldsmith’s photography and knew that Goldsmith did fantastic work and had a good rapport with people in the music industry; they considered her an “A” list photographer for the type of assignment to photograph a performer like Prince. *Id.*

23. Kreiman agreed that Goldsmith should photograph Prince on assignment from Newsweek. Werbin Exh. J [Goldsmith Tr. at 80:16 -19].

24. Pursuant to the Newsweek assignment, Goldsmith photographed Prince over a two-day period in December 1981, the first day at a live concert in New York and the second day in her photo studio that was located at 241 West 36<sup>th</sup> Street in Manhattan. Werbin Exh. J [Goldsmith Tr. at 81:7 - 82:19].

25. During the studio photo session, Goldsmith applied makeup to Prince, including eye shadow, and gave him lip gloss to put on to accentuate his sensuality, which reflected light

off of his lower lip. Werbin Exh. J [Goldsmith Tr. at 91:16 - 93:16; 94:9 - 95:12.]

26. Goldsmith added additional eye shadow to Prince because she felt he was in touch with the female part of himself, yet he was very much male. Werbin Exh. J [Goldsmith Tr. at 93:5 - 16].

27. Goldsmith used studio lighting that showed Prince's chiseled bone structure. Werbin Exh. J [Goldsmith Tr. at 97:3 - 5].

28. At the beginning of the studio photo session, Goldsmith started out taking black and white photographs of Prince because the first pictures she usually shoots were not the ones that would be given to a publication; rather, she shot black and white first for herself. Goldsmith shot very few black and white photos because Prince was very uncomfortable and she then switched to color film. Werbin Exh. J [Goldsmith Tr. at 97:23 - 98:24].

29. While still at the beginning of the photo shoot, Prince left the studio area and went to the makeup "green" room, but after 20 minutes he did not come out. Goldsmith went in and tried to coax him to return to the shooting set, but Prince did not say anything and appeared fragile to Goldsmith. Prince then left the studio. The next day Prince sent Goldsmith roses, candy and a note about how sick and nervous he was feeling and that Goldsmith did nothing wrong. The entire session did not last long and was far shorter than Goldsmith's usual studio sessions, which can take up to 12 hours. Werbin Exh. J [Goldsmith Tr. at 98:25 - 101:2].

30. The studio photos Goldsmith took of Prince show a reflection of two white lights in his eyes that were from flash umbrellas used as he was looking at the camera. Werbin Exh. J [Goldsmith Tr. at 103:16 - 23].

31. Goldsmith rarely forgets her subjects' eyes and the photos she took of Prince reflected through his eyes an uncomfortable person who was a vulnerable human being. Werbin

Exh. J [Goldsmith Tr. at 101:17 - 22].

32. Goldsmith selected the camera, lenses and types of film she used to make the Prince photos. Werbin Exh. J [Goldsmith Tr. at 106:16 - 108:22].

33. In her photos of Prince, Goldsmith was trying to capture a sense of someone who was very expressive and willing to break through what must have been his immense fears to make the type of creative works he wanted and he was frightened. Werbin Exh. J [Goldsmith Tr. at 105:12 - 106:10].

34. Goldsmith did not consider Prince's clothing, including his buttoned up look and suspenders, as contributing to an understanding of who Prince was in the portrait she made. Werbin Exh. J [Goldsmith Tr. at 103:9 - 15].

35. Goldsmith's agency, LGI, issued an invoice to Newsweek for the Prince photo sessions dated December 6, 1981. The invoice reflected that the Prince concert photo shoot took place at the Palladium on December 2, 1981, and that the studio session took place on December 3, 1981. The invoice reflected that both color and black and white film was used. The invoice granted Newsweek a license to use the photographs for one reproduction upon payment, and required that a credit be given to LGI. Werbin Exh. T [Warhol 22 (LG0000029)]; Werbin Exh. J [Goldsmith Tr. at 109:5 -113:4].

36. Goldsmith retained the copyrights in the 1981 photos she took of Prince. Werbin Exh. B [Counterclaim ¶ 19]; Werbin Exh. K [Kreiman Tr. at 82:13 - 86:6].

37. The studio photographs Goldsmith made of Prince on assignment from Newsweek included a total of 12 black and white film images and 11 color transparency film images. Werbin Exhs. U and V [LG0000197 and LG00000198 (consisting of a one contact sheet reflecting 12 black and white photographs of Prince and a copy of three strips of black and white

negatives of those images produced by the Goldsmith Parties in discovery); Werbin Exh. W [Warhol 11 – 21] (copies of color transparency images produced by the Goldsmith Parties in discovery)).

38. One of Goldsmith’s black and white photos of Prince from the December 3, 1981, studio session was the following image (the “Goldsmith Photo”), which is the subject of the Counterclaim:



Werbin Exh. B [Counterclaim at ¶ 2]; Werbin Exh. J [Goldsmith Tr. at 146:23 - 147:5]; Werbin Exh. X [LG00000026].

39. One of Goldsmith’s color concert photos of Prince was published by Newsweek on Dec. 21, 1981, in connection with an article entitled “The Naughty Prince of Rock.” The printed photo credit was to “Lynn Goldsmith – LGI,” which reflected the name of the photographer who took the photo and the name of the photo agency that represented the photographer. Werbin Exh. Y [Warhol 105]; Werbin Exh. K [Kreiman Tr. at 82:13 - 86:6].



**LGI Licenses the Goldsmith Photo to Vanity Fair in 1984**

40. In October 1984, LGI granted Vanity Fair a license to use one of Goldsmith's December 3, 1981, black and white studio portraits of Prince for use as an artist's reference in connection with an article to be published in Vanity Fair magazine. Werbin Exhs. Z and AA [Warhol Exhs. 23 and 107 (also Counterclaim Exh. B)]; Werbin Exh. J [Goldsmith Tr. at 113:8 - 118:2].

41. LGI sent Vanity Fair, to the attention of Esin Goknar, a photo approval form dated September 25, 1984, which specified "11" X 14" B&W STUDIO PORTRAIT OF PRINCE BY © 1981 LYNN GOLDSMITH FOR POSSIBLE USE AS AN ARTIST REFERENCE." Werbin Exh. Z [Warhol Exh. 23]; Werbin Exh. J [Goldsmith Tr. at 115:25 - 118:2]

42. Esin Goknar was photo or picture editor at Vanity Fair in 1984; she testified that the term "artist reference" meant an artist "would create a work of art based on image reference." Werbin Exh. L [Transcript of deposition of Esin Goknar dated March 27, 2018 ("Goknar Tr."), at 28:8 - 29:12]; Werbin Exhs. Z and AA [Warhol Exhs. 23 and 107 (also Counterclaim Exh. B)].

43. The submission agreement specified on its reverse side: "Material submitted on approval is not sold and no rights are acquired until an invoice is submitted by Lynn Goldsmith. All rights not specifically granted on invoice are reserved by Lynn Goldsmith." Werbin Exh. Z [Warhol 23].

44. LGI issued Vanity Fair an invoice form dated October 29, 1984 (the "VF Invoice"), which specified: "ordered by Esin Goknar." The invoice granted Vanity Fair a license to use one of Goldsmith's 1981 studio black and white photographs of Prince subject to the

following terms:

FEE FOR THE USE OF ONE PHOTOGRAPH OF PRINCE,  
COPYRIGHT 1981 LYNN GOLDSMITH FOR USE AS ARTIST  
REFERENCE FOR AN ILLUSTRATION TO BE PUBLISHED  
IN VANITY FAIR NOVEMBER 1984 ISSUE. IT CAN APPEAR  
ONE TIME FULL PAGE AND ONE TIME UNDER ONE  
QUARTER PAGE. NO OTHER USAGE RIGHTS GRANTED.

ONE TIME ENGLISH LANGUAGE ONLY NORTH  
AMERICAN DISTRIBUTION ONLY.

Werbin Exh. AA [Warhol Exh. 107 (also Counterclaim Exh. B)].

45. The VF Invoice further expressly provided:

License is granted to use the above-described photograph(s) on  
condition that total amount shown hereon is paid. The credit line –  
LYNN GOLDSMITH – must not be omitted, abbreviated or  
altered under penalty of double charge. Released, on rental basis  
only, and in accordance with terms and conditions of submission.  
License, for one reproduction only, is granted to reproduce above  
described photograph(s) in

IN VANITY FAIR NOVEMBER 1984 ISSUE

*Id.*

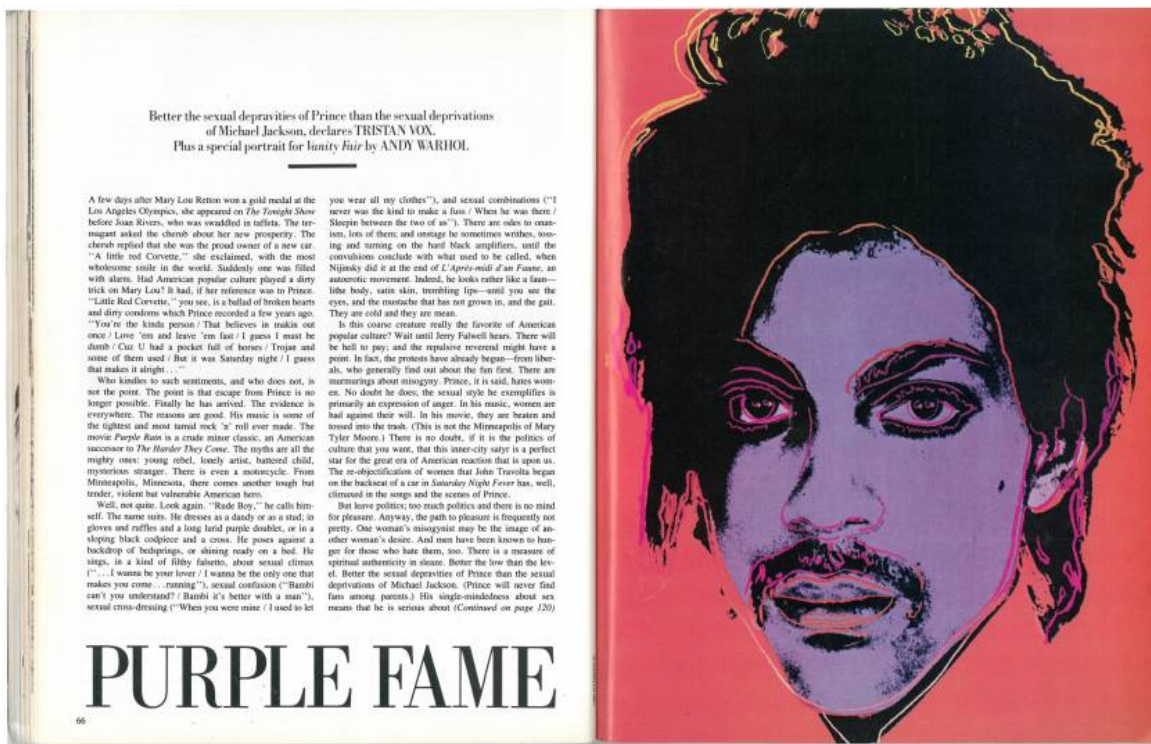
46. The VF Invoice noted “PAID DATE DEPOSITED CHECK. NO. 2/8/85.” The  
license fee was \$400. Werbin Exh. VV [LG 11 (same as Warhol 28)]; Werbin Exh. Z [Warhol  
Exh. 23].

47. Goldsmith had no knowledge in 1984 that one of her Prince photographs was  
submitted by her agency LGI to Vanity Fair for use as an artist reference. At that time, an  
employee of LGI, Wilma Roberts, would have been involved in submitting the Goldsmith Photo  
to Vanity Fair and the initials “WR” appear faintly on the invoice license form issued to Vanity  
Fair. Goldsmith had no involvement in selecting the photograph that was submitted to Vanity  
Fair. Werbin Exh. J [Goldsmith Tr. at 115:10 - 117:15]; Werbin Exh. B [Counterclaim Exh. B].

## **Vanity Fair Commissions Warhol to Create an Illustration Using the Goldsmith Photo as Artist Reference**

48. Vanity Fair commissioned Warhol to create an illustration of Prince for the November 1984 issue of the magazine, Volume 47, No. 1 (the “VF Issue”). Werbin Exh. BB [LG 64 (at AWF 951)][Confidential]; Werbin Exh. M [Transcript of deposition of Neil Printz dated February 8, 2018 (“Printz Tr.”) at 86:2 - 97:13]; Werbin Exh. CC [LG-4]; Werbin Exh. O [Transcript of Deposition of Chris Donnellan dated March 15, 2018 (“Donnellan Tr.”) at 38:15 - 40:8].

49. The VF Issue published an article entitled “Purple Fame” by Tristan Vox (the “VF Article”), which began on page 66 and depicted on page 67 a full-page color illustration of Prince created by Warhol for the article (the “VF Warhol Image”). The article’s attribution credits stated it featured “a special portrait for *Vanity Fair* by ANDY WARHOL.” The VF Warhol Image appeared as follows:



Werbin Exh. DD [LG 91 at pp. 66 - 67].

50. The VF Article contained an attribution credit in the gutter between pages 66 and 67 stating: “LYNN GOLDSMITH/LGI,” appearing as follows:



*Id.* at page 67.

51. The VF Article published a copyright attribution credit on page 121 stating: “**Page 67:** source photograph © 1984 by Lynn Goldsmith/LGI.” *Id.* at page 121.

52. Condé Nast’s vice president of business affairs and rights management, Chris Donnellan, testified that the reference to “source photograph” in the VF Article copyright credit meant “[t]he underlying image that was used to create the artwork.” Werbin Exh. O [Donnellan Tr. at 26:17 - 28:5].

53. A copy of the VF Warhol Image also appeared on page 4 of the VF Issue next to the Table of Contents with the caption “Wails of the Prince.” Werbin Exh. DD [LG 91 at p. 4].

54. Esin Goknar would have submitted the credits accompanying the VF Article for publication and these credits indicated that Vanity Fair used one of Goldsmith’s photographs. Werbin Exh. DD [LG 91 at p. 121]; Werbin Exh. L [Goknar Tr. at 30:8 - 32:19].



55. Vanity Fair did not commission Warhol to create more than one image for the VF

Article. Werbin Exh. O [Donnellan Tr. at 20:20 - 24].

56. Goldsmith was never advised by Vanity Fair who the illustrator would be for the VF Article and never saw a copy of the Vanity Fair article at the time it was published. Werbin Exh. J [Goldsmith Tr. at 120:21 - 121:6].

**Warhol created 16 works derived from the Goldsmith Photo**



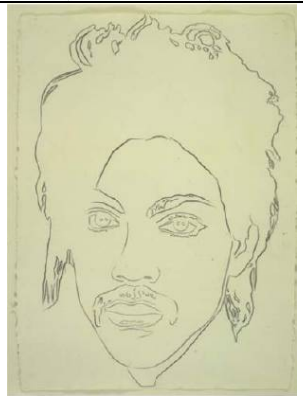
57. AWF's Complaint disclosed that in 1984 Warhol created 16 distinct works based on the Goldsmith Photo (inclusive of the VF Warhol Image), which AWF has identified by the following images and AWF-assigned inventory numbers (collectively, the "Warhol Prince Series"):

Image	AWF Inventory No.
	PO 50.537
	PO 50.539



		PO 50.538
		PO 50.541
		PO 50.540
		PO 50.543

		PO 50.542
		PO 50.545
		PO 50.544
		PO 50.547



	PO 50.546
	TOP115.260
	TOP115.259
	PO 50.548  [Typographical error in the Complaint listed this as PO 50. 458. See ¶ 61 below.]



	UP 42.72
	UP 42.73

Werbin Exh. A [Complaint pp. 9 – 12].

58. The above inventory code prefixes assigned by AWF to the Warhol Prince Series images mean the following: “PO” is for “portraits,” “TOP” is for “temporary on paper,” which includes drawings on paper, and “UP” is for “unpublished print.” Werbin Exh. N [Transcript of Deposition of Michael Hermann dated January 25, 2018 (“Hermann Tr.”) at 4:20 - 23; 32:14 - 35:14]; Werbin Exh. M [Printz Tr. at 34:23 - 35:7; 223:4 - 12].

59. The editor of AWF’s catalogue raisonné, Neil Allen Printz (“Printz”), testified that the inventory prefix “PO” means the original work was created by Warhol using silk screen printing and painting on canvas, that the inventory prefix “UP” means the original work was created by Warhol as a screen print on paper, and that the inventory prefix “TOP” means the original work was created by Warhol as a drawing on paper. Werbin Exh. M [Printz Tr. at 44:7 -

45:8; 54:8 - 55:11].

60. Each of the 16 Warhol Prince Series works was a unique and distinct image, and there are no other images of Prince that were created by Warhol. Werbin Exh. M [Printz Tr. at 54:8 - 55:11].

61. The Warhol Prince Series image designated in the Complaint on p. 12 as PO 50.458 should be PO 50.548. Werbin Exh. D [AWF Responses and Objections to Defendants' Requests for Admission ("RA Responses") No. 9].

62. Warhol Prince Series image PO 50.544 is the Warhol VF Image published in the VF Article. Werbin Exh. D [RA Responses No. 7].

63. [REDACTED] Werbin Exh. N [Hermann Tr. at 30:9 - 20] ][Confidential].

64. [REDACTED]  
[REDACTED] Werbin Exh. N [Hermann Tr. at 35:10 - 37:14; 45:16 - 20] ][Confidential].

65. AWF's catalogue raisonné records for Warhol Prince Series image PO 50.548, refers to a [REDACTED] Warhol had possessed a "time capsule" copy of "Vanity Fair vol. 47, no. 11 (November 1984)" and a "Vanity Fair article Purple Fame featuring a portrait of Prince by Andy Warhol." Printz has never seen a publicity photograph on which the Warhol Prince Series was based. Werbin Exh. BB [LG 64 at AWF 0000951][Confidential]; Werbin Exh. M [Printz Tr. at 86:2 - 92:17; 107:11 - 108:17].

**Warhol copied the Goldsmith Photo to create the Warhol Prince Series**

66. In order to create each of the Warhol Prince Series works, Warhol would have

started by making a copy of the Goldsmith Photo that Vanity Fair provided to him. Printz testified that the 12 silkscreen works (designated by the catalogue raisonné prefix “PO”) and the two screen prints (designated by the catalogue raisonné prefix “UP”) were based on a photograph and created through a process that started with Warhol “having his silkscreen printer create a high contrast half tone silkscreen from a photograph”:

The photograph would be enlarged and photographically reproduced onto a sheet of clear plastic, otherwise known as an acetate, to create a halftone image. In other words, the continuous tone, all the values of light to dark in the photograph would be reduced into a high contrast image so transitional tones would be dropped out, deliberately dropped out.

Andy Warhol would look at that image, decide how he wanted to modify it, and if he did the – they would make another acetate that he could use to trace local color shapes onto the canvas and paint, for example, the face area in PO 50537. And then the printer would use the acetate to photo mechanically reproduce that onto a silkscreen.

Q Do you know how the photo would be reproduced onto a silkscreen?

A My understanding is the silkscreen would be treated with, like, a photographic paper with photosensitive material.

Werbin Exh. M [Printz Tr. at 51:3 - 53:6].

67. Once a silkscreen was physically created from the underlying photograph, Printz testified that Warhol would have created the silkscreen works on canvas, designated with a “PO” prefix, as follows:

A silkscreen would be placed on top of the canvas which was usually painted first, so when the paint was dry the screen would be placed on top of a canvas, un-stretched canvas. Ink would be put on the screen and a squeegee would be used by the printer to pull the ink across the mesh of the screen leaving an image on the surface of the canvas, then the screen would be removed from the canvas.

Q So --

A And probably cleaned.

Q When you say the canvas would usually be painted first, are you referring to some background coloration?

A Background and additional, what I would call local color.

Q What does local color mean?

A For example, in PO 50537, and in PO 50544, and in PO 50547, I believe also in PO 50458, it is the color that -- color of the face -- of the shape the face, the whole face.

Q I'm sorry, you said the color of the face would have been painted separate from the silkscreen process?

A In those works, yes.

*Id.* [Printz Tr. at 45:17 - 46:21].

68. Printz further testified that the color backgrounds on the silkscreen “PO” works were painted first by Warhol. *Id.* [Printz Tr. at 46:25 - 48:9].

69. With respect to the two screenprints with the “UP” prefix designations, Printz testified that they were created on paper instead of canvas and the process differed from making the “PO” designated silk screen paintings because there are no painted backgrounds or faces:

Q What were the differences?

A There is no painted background and there is no painted face.

Q So is the image we see created just from the silkscreen process itself and no painting?

A Is the image in the UP4272 and 4273?

Q Yes.

A Repeat the rest of the question.

Q With respect to those two UP designated images, would they have been created only by the silkscreen process without any painting having been done separately?

A Yes. They would have been created entirely with the silkscreen technique, both works. As far as I can tell.

*Id.* [Printz Tr. at 48:10 - 49:18].

70. Printz testified that the two drawings within the Warhol Prince Series with the prefix “TOP” were created by Warhol projecting the underlying photograph and creating a contoured drawing based on that photograph, as follows:

Q And if you could look at the bottom right image on Page 11, with a T-O-P designation of 115.260. And at the top left of Page 12, which is also a top left designated as TOP 115.259. Are these drawings?

A Yes, I believe they are.

Q And do you know how these were created by Warhol?

A Yes. I believe I do.

Q How were they created?

A He would typically -- characteristically he would project an image in an opaque projector, an enlarger onto a sheet of paper and draw on the sheet of paper with a pencil freehand over the projected image.

Q So it would essentially be a outline drawing of the projected image?

A Contoured drawing would be more accurate.

Q What is a contoured drawing?

A A contoured drawing follows the contours, the outlines of the head, the face, the features to the degree he chooses to.

Q And do you know whether those drawings, those TOP designated drawings utilized a photograph that was projected to create these works.

A Characteristically they would be.

*Id.* [Printz Tr. at 49:19 - 51:2].

**AWF's acquisition and disposition of the Warhol Prince Series**

71. Warhol died on February 22, 1987. Werbin Exh. A [Complaint ¶ 47].

72. AWF was created as a not-for-profit organization in 1987 in accordance with Warhol's will. Werbin Exh. A [Complaint ¶ 8]; Werbin Exh. N [Hermann Tr. at 25:2 - 6]; <https://warholfoundation.org/foundation/index.html>.

73. Following Warhol's death, AWF acquired title to and ownership of the copyrights in the Warhol Prince Series. Werbin Exh. A [Complaint ¶ 49]; Werbin Exh. D [RA Responses Nos. 15, 16].

74. Between 1993 and 2004, AWF sold or transferred custody of 12 of the original Warhol Prince Series works to third parties identified by AWF as PO 50.537, PO 50.539, PO 50.540, PO 50.541, PO 50.543, PO 50.545, PO 50.546, PO 50.548, TOP 115.259, TOP 115.260, UP 42.72 and UP 42.73. Werbin Exh. D [RA Responses Nos. 17, 19].

75. Custody of the remaining four original Warhol Prince Series works identified by AWF as PO 50.538, PO 50.542, PO 50.544 and PO 50.547 was transferred to The Andy Warhol Museum by AWF by 1998. Werbin Exh. D [RA Response No. 18].

**AWF's representative agency Artist Rights Society**

76. Artist Rights Society ("ARS") has acted as a representative agency for AWF since in or about 1988 or 1989 pursuant to written licensing agent or "membership" agreements. Werbin Exh. Q [Transcript of Deposition of Adrienne Rachel Fields, Esq., ARS Director of

Legal Affairs dated February 6, 2018 (“Fields Tr.”) at 11:5 - 19].

77. ARS has the right to act on behalf of AWF as its representative for copyright licensing. Werbin Exh. Q [Fields Tr. at 15:7 - 16].

78. [REDACTED]  
[REDACTED]

[REDACTED] Werbin Exh. Q [Fields Tr. at 11:20 - 14:23] [Confidential]; Werbin Exhs. EE and FF [LG 29; LG 30] [Confidential].

79. [REDACTED]  
[REDACTED]

[REDACTED] Werbin Exh. EE [LG 29 at pp. 1 – 3] [Confidential]; Werbin Exh. Q [Fields Tr. at 16:6 - 20][Confidential].

80. [REDACTED]  
[REDACTED]

[REDACTED] Werbin Exh. N [Hermann Tr. at 170:6 - 21] [Confidential].

81. [REDACTED]  
[REDACTED]

[REDACTED] Werbin Exh. N [Hermann Tr. at 174:2 - 10] [Confidential].

82. [REDACTED]  
[REDACTED]

[REDACTED] Werbin Exh. N [Hermann Tr. at 174:11 -18] [Confidential].

83. [REDACTED]  
[REDACTED]

[REDACTED] Werbin Exh. Q [Fields Tr. at 19:25 - 20:7] [Confidential].

84. [REDACTED]

Werbin Exh. Q [Fields Tr. at 19:13 - 23] [Confidential].

85. Third parties make permission requests for licensing Warhol images either to ARS directly or to AWF. AWF notifies ARS if it receives a licensing request. ARS generates licensing agreements and AWF sends digital image files directly to the client licensing the image on an as-needed basis. A separate image rental fee may be charged. Both license and image fees are typically invoiced by ARS to the client. Werbin Exh. Q [Fields Tr. at 23:5 - 25:17].

86.

Werbin Exh. Q [Fields Tr. at 28:23 - 29:8] [Confidential].

### AWF licenses a Warhol Prince Series image to Condé Nast in 2016

87. Prince died on April 21, 2016. [https://en.wikipedia.org/wiki/Prince \(musician\)](https://en.wikipedia.org/wiki/Prince_(musician))

88. On April 22, 2016, Vanity Fair published online a copy of the 1984 VF Article, which was re-formatted and contained the following attribution credit under the article title: “By Lynn Goldsmith/LGI/Andy Warhol Foundation.” The re-published article also displayed the original gutter credit “Lynn Goldsmith/LGI” as in the original 1984 print version. The first page of the re-published version appeared as follows:



Purple Fame: An Appreciation of Prince at the Height of His Powers |... <https://www.vanityfair.com/culture/2016/04/prince-at-the-height-of-hi...>



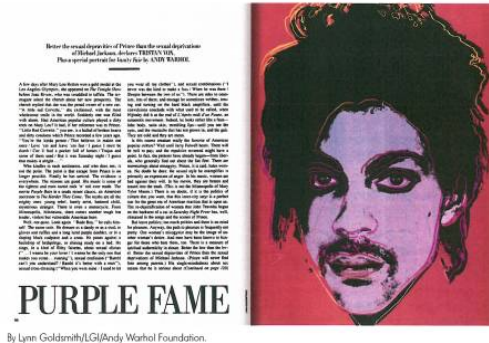
Sign In Subscribe

FROM THE ARCHIVES

## Purple Fame: An Appreciation of Prince at the Height of His Powers

Leon Wieseltier, under the pen name Tristan Vox, wrote about Prince for the November 1984 issue of *Vanity Fair*.

BY TRISTAN VOX | APRIL 22, 2016 2:30 PM



A few days after Mary Lou Retton won a gold medal at the Los Angeles Olympics, she appeared on *The Tonight Show* before Joan Rivers, who was swaddled in taffeta. The termagant asked the cherub about her new

1 of 8

2/6/2018, 9:53 AM

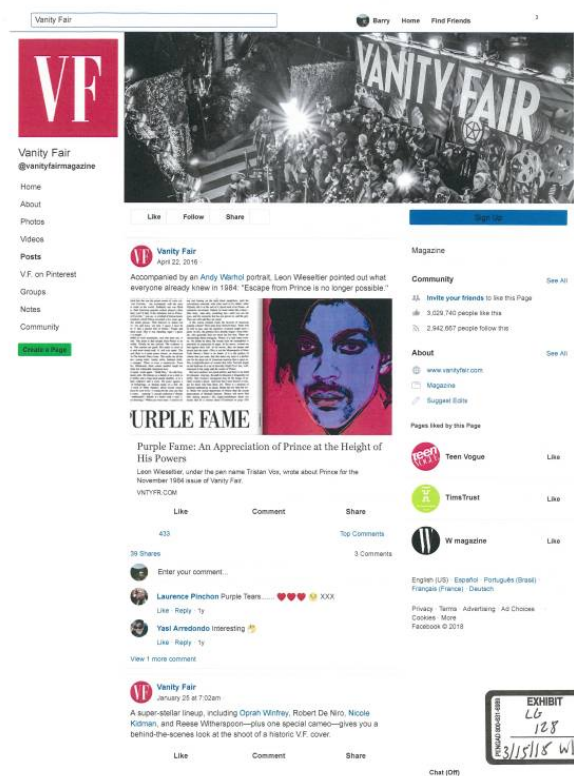
Werbin Exh. GG [LG-61]; <https://www.vanityfair.com/culture/2016/04/prince-at-the-height-of-his-powers>.

89. Condé Nast's database included an image of the 1984 VF Article that was posted on the Vanity Fair Facebook page on April 22, 2016, and reflected the credit: "By Lynn Goldsmith/LGI/Andy Warhol Foundation." This reflected the original gutter credit in the VF Article. The gutter credit was printed under the heading of the VF Article in the April 22, 2016, Facebook posting because the gutter credit could not be seen on a computer, which was a matter of custom and practice at Condé Nast. Werbin Exhs. GG and HH [LG-61; LG-130]; Werbin Exh. O [Donnellan Tr. at 90:17 - 96:7].

90. On April 22, 2016, Vanity Fair also published on its Facebook page the following reproduction of the 1984 VF Article, which depicted the gutter credit to "Lynn Goldsmith/LGI":

(3) Vanity Fair - Posts

<https://www.facebook.com/vanityfairmagazine/posts/10153709288767572>



1 of 5

2/22/2018, 6:50 PM

Werbin Exh. II [LG-128];

<https://www.facebook.com/vanityfairmagazine/posts/%2010153709288767572>

91. Vanity Fair is currently and was in 1984 owned and published by Condé Nast.

Werbin Exh. O [Donnellan Tr. at 8:16 - 9:13].

92. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Werbin Exhs. JJ and KK [LG-3; LG-5] [Confidential].

93. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Werbin Exh. JJ [LG-3] [Confidential].

94. [REDACTED]  
[REDACTED]  
[REDACTED]  
Werbin Exh. CC [LG-4] [Confidential]; Werbin Exh. N [Hermann Tr. at 4:20 - 23]  
[Confidential].

95. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Werbin Exh. LL [LG-58 at p. 4 of  
email chain] [Confidential].

96. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Werbin Exh. LL [LG-58 at p. 3] [Confidential]; Werbin Exh. KK [LG-5] [Confidential].

97. There was a “grueling closing” schedule because “Prince had died and there was a push to get it out on newsstands.” Werbin Exh. O [Donnellan Tr. at 67:22 - 25; 69:18 - 70:9].

98.

[REDACTED] Werbin Exh. LL [LG-58 at p. 3] [Confidential].

99.

[REDACTED] [Id. at p. 1 of email chain] [Confidential].

100.

Werbin Exh. MM [LG-6] [Confidential].

101.

[REDACTED] Werbin Exh. NN [LG-56 (at seventh page of ARS-produced emails)] [Confidential]. This meant that AWF had transmitted to Condé Nast a link to download a high resolution file of the Prince image. Werbin Decl. Q [Fields Tr. at 109:22 - 110:11].

102. The image file AWF provided to Condé Nast was for the Warhol Prince Series image No. PO 50.541. Werbin. Exh. A [Complaint p. 9 (bottom right image); ¶ 52].

103.

Werbin Exh. OO [LG-57 at p. 2 of emails] [Confidential].

104. [REDACTED]

Werbin Exh. N [Hermann Tr. at 114:22 - 115:13].

105. [REDACTED]

[REDACTED] Werbin Exh. NN [LG-56 at pp. 4 – 5 in email chain] [Confidential].

106. [REDACTED]

[REDACTED] Werbin Exh. OO [LG-57 at p. 2 of email chain] [Confidential].

107. [REDACTED]

[REDACTED] Werbin Exh. Q

[Fields Tr. at 113:16 - 114:23].

108. [REDACTED]

Exh. OO [LG-57 at p.1 of email chain] [Confidential].

109.

**Werbin Exh. PP [LG-59] [Confidential].**

110.

[REDACTED] Werbin Exh. NN [LG-56 at pp. 1-2  
of email chain] [Confidential].

111.

Werbin Exh. PP [LG-59] [Confidential].

112.

Werbin Exh. QQ [LG-9] [Confidential].

113. In May 2016, Condé Nast published a “special interest publication” or “SIP” commemorative magazine (the “CN Magazine”) devoted to Prince entitled “The Genius of Prince,” which featured on its cover Warhol Prince Series image PO 50.541, as licensed by AWF through ARS (the “Warhol CN Image”). As published, the cover appeared as follows:



Werbin Exh. RR [LG-75]; Werbin Exh. O [Donnellan Tr. at 15:21 - 16:12].

114. The CN Magazine remained on newsstands for three months, as do all Condé Nast SIPs. Werbin Exh. O [Donnellan Tr. at 72:10 - 73:2].

115. The CN Magazine listed a copyright credit for the Warhol CN Image as “Andy Warhol, Prince, © 1984. Synthetic polymer paint and silkscreen ink on canvas, 20 x 16. Image and artwork © The Andy Warhol Foundation for the Visual Arts, Inc./Licensed by ARS.” No credit of any kind was given to Goldsmith. Werbin Exh. RR [LG-75 at p. 95].

116. In planning the CN Magazine, Condé Nast did not investigate whether Goldsmith owned any rights with respect to the Warhol CN Image because Condé Nast’s rights clearance database had no record of her. That database only reflected a need to obtain rights clearance from Warhol’s estate with respect to the Warhol CN Image. Werbin Exh. SS [LG-

116]; Werbin Exh. O [Donnellan Tr. at 19:19 - 21:19].

117. In planning the CN Magazine, Condé Nast did not investigate why a copyright credit was given to Goldsmith in the 1984 VF Article or whether there was any license documentation concerning the Warhol CN Image. Condé Nast had a copy of the 1984 VF Issue in its physical library but did not review it because research was not usually done of the physical library unless there was no other record of the content that would be used. Werbin Exh. O [Donnellan Tr. at 41:12 - 42:12; 43:13 - 18].

118. In planning the CN Magazine, Condé Nast's internal emails acknowledged on April 21, 2016, the day Prince died, that "Andy Warhol DREW HIM on a special assignment for Vanity Fair, November 1984. Short appreciation by Tristan Vox (a pseudonym ?)." Condé Nast's vice president of business affairs and rights management, Chris Donnellan, testified that the term "special assignment" meant that Warhol was commissioned by Vanity Fair for a special assignment and that "commissioned" meant that in contrast to "numerous instances where [Condé Nast has] republished Warhol images in our magazines, this was something he was creating for the magazine at the request of the magazine." Donnellan noted that "it was so rare for Warhol to create something for a magazine...." Werbin Exh. TT [LG-117]; Werbin Exh. O [Donnellan Tr. at 32:17 - 36:14; 38:15 - 40:8].

119. [REDACTED]

Werbin Exh. N [Hermann Tr. at 97:13 - 98:20] [Confidential].

**Goldsmith discovers the existence of the Warhol Prince Series**

120. Goldsmith first learned that Warhol created the illustration of Prince for the VF Article after seeing images of Prince posted online by his fans following Prince's death on April 21, 2016, and these included the Warhol images used for the VF Article and the CN Magazine



cover. Werbin Exh. B Counterclaim ¶ 21; Werbin Exh. J [Goldsmith Tr. 127:5 - 25].

121. Goldsmith had never seen a Warhol image of Prince before and she did a Google image search of the online images. The VF Article came up in the search results and Goldsmith saw her name in the credits. Werbin Exh. J [Goldsmith Tr. 125:6 - 22].

122. Goldsmith called Michael Hermann at AWF and advised him that she believed one of her images had been infringed in reference to the CN Magazine. Hermann asked her to send him a copy of the image. Werbin Exh. N [Hermann Tr. at 123:20 - 124:18; 131:19 - 23].

123. Following that call, on July 28, 2016, at 11:53 AM, Goldsmith sent an email to Hermann attaching a copy of one of her 1981 color studio photographs of Prince, which was a three-quarter shot that showed Prince with his hands in his pockets against a white background. Goldsmith initially thought that this color Prince photograph had been used because she found a scan of it in her digital archive and it had been printed in one of her own published photography books. Goldsmith's email included a copy of her color photograph of Prince and a copy of that photograph with the VF Warhol Image superimposed on it digitally. Werbin Exh. UU [LG 10 (same as Warhol 24)]; Werbin Exh. J [Goldsmith Tr. at 123:19 - 125:5; 128:7 - 15; 150:17 - 152:18].

124. Upon seeing online images of the 1984 VF Article with her attribution credit, however, Goldsmith assumed an image of hers had been licensed to Vanity Fair and she then found the license to Vanity Fair that showed it was a black and white image that had been licensed. Werbin Exh. J [Goldsmith Tr. at 125:6 - 126:7; 150:17 - 152:18].

125. Goldsmith then compared the CN Magazine cover image to the black and white Goldsmith Photo by digitally scanning her black and white negative and superimposing the magazine cover digitally on top of it to create the following digital "GIF" image:



LG00000009



LG00000010

Werbin Exh. B Counterclaim ¶ 5; Werbin Exh. VV [LG 11 (same as Warhol 28) at LG00000009 – 10 (GIF and black and white images)]; Werbin Exh. J [Goldsmith Tr. at 153:2 - 154:2].

126. Goldsmith emailed Hermann again on July 28, 2016, at 7:25 PM, advising him that after further research, the Warhol image was not based on her color portrait of Prince but on her black and white Goldsmith Image that was made during the same studio session. She also advised Hermann that she had found the 1984 license to Vanity Fair and attached to that email the above animated “GIF” image superimposed over her black and white photo. She advised Hermann that she had been unaware of these uses before. Werbin Exh. VV [LG 11 (same as Warhol 28)]; Werbin Exh. N [Hermann Tr. 132:7 - 133:16].

127. The black and white Goldsmith Photo that was included with Goldsmith’s later-sent email to Hermann on July 28, 2016, was not included in the Complaint; only the three-quarter color photo Goldsmith included with her first email of July 28, 2016, was included in the Complaint. Werbin Exhs. UU and VV [LG 10 (same as Warhol 24); LG 11 (same as Warhol

28); Werbin Exh. A [Complaint at ¶ 22].

**AWF's licensing market for the Warhol Prince Series images**

128. From the respective times AWF transferred legal title to or custody of each original work in the Prince Series, images of the Warhol Prince Series works have been made available for licensing by AWF, directly or through its agents, to third parties. Werbin Exh. D [RA Response No. 21].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Werbin Exh. EE [LG 29 at Exhibit "E" thereto] [Confidential]; Werbin Exh. Q [Fields Tr. at 15:17 - 19:12] [Confidential].

130. [REDACTED]

[REDACTED]

[REDACTED] Werbin Exh. N [Hermann Tr. at 187:25 - 190:14] [Confidential].

131. [REDACTED]

[REDACTED] Werbin Exh. N [Hermann Tr. at 191:14 - 25; 201:23 - 202:11] [Confidential].

132. [REDACTED]

[REDACTED] Werbin Exh. N [Hermann Tr. at 203:7 - 204:21] [Confidential].

133. [REDACTED]

[REDACTED] Werbin Exh. WW [LG 23 (marked “Confidential”)];  
Werbin Exh. N [Hermann Tr. at 205:3 - 207:24] [Confidential].

134. Many Warhol images (but not of Prince) have been used on record album covers.  
Werbin Exh. XX [Paulson 10].

135. AWF makes images of the Warhol Prince Series available for licensing. Werbin  
Exh. D [RA Responses No. 20 [REDACTED]

[REDACTED] Werbin Exh. ZZ (“Warhol/ ‘Prince Report’”) [LG-31] [Confidential]; Werbin Exh. Q  
[Fields Tr. 29:18 – 31:10] [Confidential].

136. The following licenses and image rentals for images of the Warhol Prince Series  
have been issued by ARS on behalf of AWF since 1999:

[REDACTED]

[REDACTED]

[REDACTED]

(ii) June 15, 2016, license to Condé Nast for use of Warhol Prince Series image No. PO 50.541 for editorial use on a cover for a fee of \$10,000, of which \$2,500 was paid to ARS as a commission and the balance of \$7,500 was paid to AWF. Werbin Exh. A [Complaint ¶ 53]; Werbin Exh. D [RA Response No. 10].

(iii) April 25, 2016, photo rental fee of \$250 to Condé Nast in connection with the publication in (ii) above, of which \$187.50 was paid to AWF. Werbin Exh. D [RA Response No. 11].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(vii) April 22, 2013, license to Condé Nast for full page color editorial use of Warhol Prince Series image PO 50.544 in a book entitled *Vanity Fair: 100 Years*, for a fee of \$1,125, of which \$843.75 was paid to AWF. Werbin Exh. D [RA Response No. 12].

(viii) April 3, 2013, photo rental fee of \$410 to Vanity Fair (Condé Nast) in connection with the publication in (vii) above, of which \$307.50 was paid to AWF.

The Warhol Prince Series image licensed was “PO 50.544.” Werbin Exh. D [RA Response No. 13].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Werbin Exh. YY [LG-31 ARS “Warhol / ‘Prince’ Report”][Confidential]; Werbin Exh. Q [Fields Tr. at 50:23 - 55:10; 57:19 - 58:22; 64:3 - 65:23; 98:5 - 100:10; 121:8 - 122:25; 130:12 - 131:18] [Confidential]; Werbin Exh. Q [Fields Tr. at 78:14 - 80:6; 86:8 - 88:88]; Werbin Exh. D [RA Response Nos. 10-13]; Werbin Exh. ZZ [LG-46] [Confidential].

137. The license and image rental fee in ¶ 130 (vii) and (viii) above were in connection with a Vanity Fair 100<sup>th</sup> anniversary coffee table book that Condé Nast was involved in producing with a third-party publisher. Condé Nast licensed from AWF, through ARS, a high-resolution digital copy of the VF Warhol Image designated as PO 50.544 to publish in this book as an interior image. The book is still in print. Werbin Exh. O [Donnellan Tr. at 98:14 - 100:12]; Werbin Exh. ZZ [LG-46]; Werbin Exh. D [RA Responses Nos. 12, 13].

**Goldsmith’s market, sales of fine art prints and image licensing**

138. Between 2003 and 2016, Goldsmith, through her agency LGI, licensed single

images of her own stock photography generally for the following totals and ranges of fees, by year:

Year	Total license fees	Range of fees per photo	Supporting exhibits (marked "Confidential")
2016	\$77,950	\$100 - \$7,500	Werbin Exh. AAA [Warhol 74]
2015	\$128,410	\$200 - \$6,500	Werbin Exh. BBB [Warhol 71]
2014	\$125,845	\$100 - \$10,000	Werbin Exh. CCC [Warhol 66]
2013	\$65,130	\$100 - \$3,000	Werbin Exh. DDD [Warhol 65]
2012	\$47,759	\$50 - \$5,000	Werbin Exh. EEE [Warhol 62]
2011	\$47,485	\$100 - \$5,250	Werbin Exh. FFF [Warhol 60]
2010	\$61,050	\$100 - \$3,500	Werbin Exh. GGG [Warhol 57]
2009	\$165,992	\$100 - \$5,000	Werbin Exh. HHH [Warhol 54]
2008	\$140,848	\$150 - \$70,000	Werbin Exh. III [Warhol 53]
2007	\$58,450	\$100 - \$10,000	Werbin Exh. JJJ

			[Warhol 51]
2006	\$61,596	\$100 - \$3,500	Werbin Exh. KKK [Warhol 46]
2005	\$95,574	\$100 – \$18,900	Werbin Exh. LLL [Warhol 45]
2004	\$67,500	\$75 - \$9,988	Werbin Exh. MMM [Warhol 44]
2003	\$28,579	\$56 - \$1,000	Werbin Exh. NNN [Warhol 43]

139. Between 2003 and 2016, Goldsmith, through her agency LGI, sold fine art prints of her photographs generally for the following totals and ranges of fees, by year:

Year	Total sales	Range of sale prices	Supporting exhibits (marked “Confidential”)
2016	\$217,137	\$600 - \$8,000	Werbin Exh. AAA [Warhol 74]
2015	\$128,410	\$325 - \$6,500	Werbin Exh. BBB [Warhol 71]
2014	\$139,990	\$250 - \$6,000	Werbin Exh. CCC [Warhol 66]
2013	\$108,282	\$300 - \$4,500	Werbin Exh. DDD [Warhol 65]
2012	\$239,449	\$300 - \$7,500	Werbin Exh. EEE



			[Warhol 62]
2011	\$93,195	\$675 - \$4,725	Werbin Exh. FFF [Warhol 60]
2010	\$95,491	\$850 – \$5,000	Werbin Exh. GGG [Warhol 57]
2009	\$86,590	\$850 - \$8,100	Werbin Exh. HHH [Warhol 54]
2008	\$201,377	\$125 - \$8,250	Werbin Exh. III [Warhol 53]
2007	\$189,305	\$450 – \$5,625	Werbin Exh. JJJ [Warhol 51]
2006	\$175,787	\$200 - \$5,000	Werbin Exh. KKK [Warhol 46]
2005	\$61,025	\$375 - \$4,275	Werbin Exh. LLL [Warhol 45]
2004	\$112,199	\$350 - \$2,900	Werbin Exh. MMM [Warhol 44]
2003	\$37,612	\$150 - \$3,100	Werbin Exh. NNN [Warhol 43]

140. Goldsmith creates her own “rock mosaics,” which depict a photograph of a person that is made up of a minimum of 2,000 other photographs taken by Goldsmith over a period of time, anywhere from three to 20 years, and are derivative of her own work. Werbin Exh. J

[Goldsmith Tr. at 243:5 - 11].

141. Goldsmith currently offers her rock mosaic prints for sale in limited editions of 10 for each size of vertical mosaics of 30 x 40 inches and 40 x 60 inches, and for each size of panoramic mosaics of 14 x 42 inches and 19 x 60 inches, at prices ranging from \$5,000 to \$12,000 each for the first nine prints in an edition, and for the last print in an edition at a higher price provided upon request. Werbin Exh. OOO [Warhol 91]; Werbin Exh. J [Goldsmith Tr. at 310:7 - 311:6].

142. Goldsmith currently offers for sale her fine art prints of rock musicians in editions of 20, both color and black and white, at prices ranging from \$1,700 to \$12,000, depending on the size ranging from 11 x 14 inches to 56 inches or larger, for the first 19 prints in an edition, and pricing upon request for the last print in an edition. These prices would also apply to fine art prints of any Goldsmith photographs of Prince made in 1981 on assignment for Newsweek. Werbin Exh. PPP [Warhol 92]; Werbin Exh. J [Goldsmith Tr. at 311:8 - 315:5].

143. Goldsmith has not yet editioned and sold any prints of the black and white Goldsmith Photo from the 1981 studio session of Prince because she doesn't edition all her work at once, and as she gets older she intends to start editioning her other works, anticipating that prices will then go up. Goldsmith had editioned her concert imagery of Prince from 1981 and other portraits she did of Prince in 1993, but she was not ready to edition the 1981 studio portraits of Prince, particularly the close-up heads of Prince. Werbin Exh. J [Goldsmith Tr. at 315:6 - 316:10].

144. Following Prince's death in April 2016, on May 2, 2016, Goldsmith, through her agency LGI, licensed a color photograph of Prince, which she took at a concert in 1986, to People Magazine for \$1,000. Werbin Exh. J [Goldsmith Tr. at 277:12 - 279:3]; Werbin Exh.

AAA [Warhol Exh. 74 at p.4] [Confidential].

145. On May 2, 2016, Goldsmith, through LGI, licensed a black and white concert photograph of Prince, which she took at the December 2, 1981, concert shoot for Newsweek, to People Magazine for \$1,000. *Id.* [Goldsmith Tr. at 279:4 - 21]; Werbin Exh. AAA [Warhol Exh. 74 at p. 4] [Confidential].

146. Both images licensed by LGI to People Magazine in 2016 were used by People Magazine for a photographic history of Prince. *Id.* [Goldsmith Tr. at 278:15 - 25].

147. On June 23, 2016, Goldsmith, through LGI, licensed a color photograph of Prince to New Bay Guitar World for \$2,300 for use on the cover of the magazine Guitar World. *Id.* [Goldsmith Tr. at 279:22 - 281:20]; Werbin Exh. AAA [Warhol 74 at p. 4] [Confidential].

148. On May 28, 2015, Goldsmith, through LGI, licensed a 1993 color studio photograph of Prince to Camera Press/Earth Port FX, for \$500. *Id.* [Goldsmith Tr. at 260:14 - 263:9]; Werbin Exh. BBB [Warhol 71 at. p. 3] [Confidential].

149. On May 24, 2013, Goldsmith, through LGI, licensed a 1993 black and white photo of Prince to the Smithsonian Institution's Natural Portrait Gallery for use in a museum exhibition catalogue for \$400. *Id.* [Goldsmith Tr. at 250:11 - 251:9; 253:5 - 24; Werbin Exh. DDD [Warhol 65 at. p. 3] [Confidential].

150. On November 7, 2013, Goldsmith, through LGI, licensed another photo of Prince to Readers Digest for \$150. *Id.* [Goldsmith Tr. at 251:10 – 16; 253:25 – 254:20]; Werbin Exh. DDD [Warhol 65 at. p. 3] [Confidential].

151. On July 22, 2010, Goldsmith, through LGI, licensed a 1993 black and white studio photograph of Prince to Rittor Music for \$400 use in a Japanese publication called “Guitar Magazine.” *Id.* [Goldsmith Tr. at 233:19 – 234:5; 237:6 – 22]; Werbin Exh. GGG [Warhol 57 at.

p. 2] [Confidential].

152. On September 2, 2009, Goldsmith, through LGI, licensed a photo of Prince called “Lightening Bolts” to Hard Rock Hotels for \$2,000. *Id.* [Goldsmith Tr. at 211:24 - 213:6]; Werbin Exh. HHH [Warhol 54 at. p. 3] [Confidential].

153. On October 29, 2007, Goldsmith, through LGI, licensed a photo of “Prince Jumping” to People Magazine for \$250 for ¼ page use. *Id.* [Goldsmith Tr. at 207:2 - 23]; Werbin Exh. JJJ [Warhol 51 at p. 3] [Confidential].

154. On September 16, 2005, Goldsmith, through LGI, licensed a 1993 color photo of “Prince w/orange background” to Dennis Publishing/Blender Magazine for \$350, not to exceed ¼ page. *Id.* [Goldsmith Tr. at 182:9 -183:12; 202:8 - 203:4]; Werbin Exh. LLL [Warhol 45 at p. 2] [Confidential].

155. In 2004, Goldsmith sold a fine art portrait photograph she made in 1993 of Prince holding a guitar to a private collector, who also owns three Warhol works of art and is a billionaire collector owning an extensive rock and roll collection. Werbin Exh. J [Goldsmith Tr. at 175:5 - 178:13].

**Warhol and AWF previously were sued for copyright infringement**

156. Warhol was sued by photographer Patricia Caulfield in or about 1966 in the Southern District of New York (Docket No. 66 Civ. 3776) for copyright infringement for unauthorized use of Caulfield’s photograph of flowers in connection with Warhol’s Flower series of artworks. The case settled. Werbin Exh. F [Caulfield complaint (S.D.N.Y No. 66 Civ. 3776, filed November 9, 1966)]; Werbin Exh. P [Transcript of Deposition of Gerard Malanga dated February 16, 2018 (“Malanga Tr.”) at 36:17 - 37:9; 38:20 - 40:19].

157. According to his assistant at the time Gerard Malanga, after being sued by

Caulfield, Warhol realized he had to be very careful about appropriating images created by others for fear of being sued again and wanted to start taking his own photographs rather than using images owned by others. Werbin Exh. P [Malanga Tr. at 8:25 - 10:12; 38:20 - 44:44].

158. AWF was sued in the Southern District of New York in 1996 for copyright infringement by Henri Dauman and Time Inc. with respect to four pictures taken by Dauman at John F. Kennedy's funeral that were featured in the December 6, 1963 issue of Life. One of the photographs contained an image of a veiled Jacqueline Kennedy walking with the Kennedy brothers, Robert and Edward. The complaint alleged that "Warhol created a series of artworks by reproducing images of Jacqueline Kennedy; that Warhol used a total of eight 'source images' culled from newspapers and magazines; and that one of these images ... was taken from the Dauman photograph published in Life." The case settled and was voluntarily discontinued on November 13, 2001. *Dauman v. The Andy Warhol Foundation*, Docket No. 96 Civ. 9219 (TPG), 1997 WL 337488 (S.D.N.Y. 1997) (Griesa, J.) (denying AWF's motion to dismiss); Werbin Exh. G [96 Civ. 9219 Docket No. #50]; *Andy Warhol Foundation for the Visual Arts, Inc. v. Federal Insurance Company*, 189 F.3d 208, 211, 212 - 13 (2d Cir. 1999).

**Goldsmith registered her copyright in the Goldsmith Photo**

159. On November 17, 2016, Goldsmith, through her attorney, filed an electronic application with the U.S. Copyright Office for registration of the Goldsmith Photo as an unpublished work, specifying a creation date of 1981 and designating Goldsmith as both author and copyright claimant. A Certificate of Registration was issued for the Goldsmith Photo with the foregoing specifications, effective November 16, 2016, with Registration Number VAu 1-277-562 (entitled "Prince Portrait"). Werbin Exh. B [Counterclaim at ¶ 16 and Exhibit "A" thereto].

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October 12, 2018

Respectfully submitted,

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